

## Technologies of bureaucracy, standardisation and defendant marginalisation in summary criminal proceedings.

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### *Abstract*

*Since the 1980s, successive governments have become increasingly distrustful of professional judgment in those services which remain funded by the state, including the criminal justice system. Against this background governments sought to increase efficiency in summary criminal courts. One way that this seems to have occurred is via the use of standardised forms in case progression. During 2013, I conducted empirical research in which the reliance placed on standardised case management forms became apparent. As a result of that research, I argue that, while such documents may have increased the speed at which cases progress, they have the (unintended) consequence of marginalising defendant participation and limiting the types of legal issue that are litigated. As such, access to justice becomes limited to only those issues that the court is prepared to make time to consider.*

### Introduction

The election of Margaret Thatcher as Prime Minister in 1979 marked the beginning of a time when UK governments became increasingly distrustful of professional judgment in public institutions,<sup>1</sup> including the criminal justice system. Governments became increasingly concerned that lawyers were ‘wasting time’ and prolonging cases to maximise profit.<sup>2</sup> As a result, governments sought to increase efficiency in summary criminal courts. Sanders, for example, notes that New Labour adopted a regulatory, managerialist approach to criminal justice, coupled with an ‘othering’ approach to defendants.<sup>3</sup> One manifestation of governments’ desire to increase efficiency is the use of standardised forms in case progression, which operate to channel the way in which trials are conducted, creating barriers to prevent litigation of those issues which do not fit into the standardised categories of case management. Brenneis discusses how neoliberal<sup>4</sup> governments’ distrust of public services created a desire for efficiency to be both maximised and monitored through forms.<sup>5</sup>

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<sup>1</sup>Le Grand J, 'Knights, Knaves or Pawns? Human Behaviour and Social Policy' (1997) 26(2) *Journal of Social Policy* 149

<sup>2</sup>Sommerlad, H 'The Implementation of quality initiatives and the New Public Management in the Legal aid sector in England and Wales: bureaucratisation, stratification and surveillance' (1999) 6(3) *International Journal of the Legal Profession* 311-343

<sup>3</sup>Sanders A, 'What was New Labour thinking? New Labour's approach to criminal justice' in Silvestri, A. (ed), *Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice* (Centre for Crime and Justice Studies 2010).

<sup>4</sup>I use the term neoliberalism as a portmanteau term but understand it as a complex and often contradictory set of political practices that tend to substitute economic market rationalities for welfare rationalities, including the proliferation of techniques influenced by managerial principles in public service institutions. (Peck J 'Zombie neoliberalism and the ambidextrous state' (2010) 14 *Theoretical Criminology* 104).

<sup>5</sup>Brenneis D, 'Reforming Promise' in Riles, A (ed), *Documents. Artefacts of Modern Knowledge* (University of Michigan Press 2006).

Generally, “standardisation produces new legal regimes through routinisation of work.”<sup>6</sup> The use of forms in this way creates a barrier through which cases must pass in order for the courts to agree that time is being appropriately used. Generalised procedures direct the exercise of control over cases, so that routinisation appears appropriate.<sup>7</sup> Consequently, “bureaucratisation of decision-making...emerges in opposition to norms of ‘individualised’ treatment”.<sup>8</sup> Individualised treatment of cases represents the dichotomy between instrumental (efficient) and symbolic (individualised) approaches to justice.<sup>9</sup> Tata argues that individualisation cleans the criminal process of its impurities and presents the defendant as an active participant.<sup>10</sup> Increased bureaucratisation (and therefore standardisation) means that defendants might be less able to play a distinct role in the proceedings.

During the course of my empirical research, the reliance placed on standardised case management forms was clear. As a result of that research, I argue that while such documents may have increased the speed at which cases progress, they also (further) limit defendant participation and restrict the types of legal issue that are examined in depth by the courts. Access to justice thereby becomes limited to only those issues that the court thinks can be efficiently litigated. The desire for efficiency thus creates points of closure which create barriers to effective participation in the proceedings. Unfortunately, however, as the othering of defendants has increased in recent years,<sup>11</sup> there is little political motivation to dismantle such barriers.

### The perceived need for efficiency

Carlen noted, in 1976, that the volume of business which passes through the magistrates’ courts means that the proceedings need to be carefully managed.<sup>12</sup> This meant that the police prosecutors made value judgements about which cases were worthy of being dealt with early in the day, often based on whether the defendant was pleading guilty alongside an assessment of the defendant’s demeanour based on certain court accepted stereotypes.<sup>13</sup> Those stereotypes limited the ability of the defendant to present him or herself in another way.<sup>14</sup>

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<sup>6</sup> Riles A, *Collateral Knowledge. Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011); 58

<sup>7</sup> Hosticka C, 'We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality' (1979) 26(5) *Social Problems* 599; 607

<sup>8</sup> Brenneis, Op. Cit. n5

<sup>9</sup> Tata C, 'Displaying Justice. What, if anything, does “ritual individualisation” at conviction and sentencing achieve?’ *Socio-Legal Studies Association Annual Conference*. Newcastle University. 6 April 2017.

<sup>10</sup> *Ibid*

<sup>11</sup> See, for example, Wacquant, L *Punishing the Poor* (Duke University Press, 2009)

<sup>12</sup> Carlen P, 'The Staging of Magistrates' Justice' (1976) 16(1) *British Journal of Criminology* 48

<sup>13</sup> Carlen P, *Magistrates' Justice* (Martin Robertson 1976)

<sup>14</sup> For example, ‘nuts’. This technique means that when a defendant does something which is regarded as inappropriate (i.e. something which threatens the legitimacy of the proceedings), remedial methods classify defendants as acting out of time, place, mind or order. (Carlen P, *Magistrates' Justice* (Martin Robertson 1976))

Similarly, McBarnet was concerned about “bureaucratic pressures pushing the police into acceptable arrest rates, lawyers into negotiating pleas, court officials into a speedy rather than necessarily a just through-put of cases.”<sup>15</sup> Such speed denies defendants the opportunity to understand the proceedings and consequently does not necessarily persuade them that just procedures are followed.<sup>16</sup> Further, the police were aware that a less serious charge would be more likely to elicit a guilty plea and pressure to save time was evident.<sup>17</sup> This meant that lesser charges might be offered to speed up the court process. Courts have themselves noted that prosecutors might prefer summary charges<sup>18</sup> in the name of expedition but also in order to elicit early guilty pleas.<sup>19</sup> Conversely, defendants often spent protracted periods of time waiting for their cases to be called, which only increased their anxiety.<sup>20</sup> More recently, my research found that not only have prosecutors offered lesser charges but police have made more use of diversionary measures in order to increase efficiency and save money. It is via processes such as these that “the ideal of adversary justice is subjugated to an organisational efficiency”<sup>21</sup> as legal ideology becomes subordinate to economic and bureaucratic ends.<sup>22</sup> As a result, McBarnet argues that the rules of criminal justice are “neither necessary nor relevant for the lower court at all.”<sup>23</sup>

The speed of the proceedings also creates an air of informality which, to McBarnet, “would seem to be rather one-sided: the defendant’s *role*...is still governed by formal procedures, but the defendant’s *rights* are greatly reduced.”<sup>24</sup> The result is that lawyers tend, according to McConville, Sanders and Leng, to opt into a crime control model.<sup>25</sup> Thus the speed at which cases progress is likely to be assisted by the presence of a greater number of defence advocates than observed by Carlen<sup>26</sup> because those specialist practitioners are equipped with the tools for negotiating case outcomes and understand the procedural issues involved in case management.

Such situations occur because the volume of court business requires a quick, routinized approach to case management which also legitimises institutional power;<sup>27</sup> all the more so since the proliferation of managerialist techniques in publicly funded institutions since the 1990s. The impact of managerialism

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<sup>15</sup> McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 3

<sup>16</sup> Carlen P, *Magistrates' Justice* (Martin Robertson 1976)

<sup>17</sup> *Ibid*

<sup>18</sup> Summary criminal cases are those which are dealt with only in the magistrates’ courts (the lowest tier of the court system) and, generally speaking, carry a maximum penalty of six months’ imprisonment.

<sup>19</sup> Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).

<sup>20</sup> Carlen P, *Magistrates' Justice* (Martin Robertson 1976)

<sup>21</sup> *Ibid*; 20

<sup>22</sup> McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981)

<sup>23</sup> *Ibid*; 124

<sup>24</sup> *Ibid*; 140. O’Barr and Conley have similarly noted that the level of formality affects the way that participants behave, often to the detriment of the non-professional participant who is unable to utilise the formal language of dispute. Thus “a litigant who is unable to structure his or her case in this familiar form may be at a serious disadvantage” (O’Barr W and Conley J, ‘Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives’ (1985) 19(4) *Law and Society Review* 661; 686)

<sup>25</sup> McConville M, Sanders A and Leng R, *The Case for the Prosecution* (Routledge 1991).

<sup>26</sup> Carlen P, *Magistrates' Justice* (Martin Robertson 1976).

<sup>27</sup> *Ibid*

on the criminal justice process has been well documented by, among others, Sommerlad.<sup>28</sup> In the early twenty-first century, Leverick and Duff also noted “the concern of courtroom workgroups to progress through the work of the day with minimum levels of confrontation and maximum levels of speed.”<sup>29</sup> Further, Darbyshire noted in her recent study that district judges favoured “the speed of the proceedings, the *summary* nature of summary proceedings.”<sup>30</sup> Reforms which have encouraged lawyers to conduct cases at greater speed have reduced their professional autonomy and ability to use discretion,<sup>31</sup> which also encourages routinized approaches to summary criminal justice. The speed at which the proceedings operate coupled with low levels of publicly funded remuneration for defence lawyers means that defendants are, in Newman’s view, offered fragmented access to legal services.<sup>32</sup>

Such fragmentation, coupled with the specialist knowledge required to conduct the proceedings, allows, according to Castellano, the workgroup to routinize procedures.<sup>33</sup> McConville, Hodgson, Bridges and Pavlovic suggest that, because lawyers in criminal courts share similar crime control values, they tend to routinize procedures and therefore deliver standardised services.<sup>34</sup> I suggest, however, that such processes are not purely based in shared ideological assumptions but are also influenced (and perhaps more so) by the practices that develop as a result of initiatives based in policies designed to increase the speed of summary criminal process. I argue that (further) routinisation therefore appears as a by-product of demands for efficiency and is manifested by a desire to process cases in standardised ways. If McConville *et al* were correct to say that lawyers standardise services due to a “lack of genuine commitment to the client’s cause”,<sup>35</sup> things can only have been made worse by the adoption of managerial techniques since that time. As Garland notes, management measures are designed to limit professional discretion and closely regulate working practices,<sup>36</sup> such that they become standardised, and such standardisation is encouraged by the use of forms.

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<sup>28</sup>Sommerlad, H ‘The Implementation of quality initiatives and the New Public Management in the Legal aid sector in England and Wales: bureaucratisation, stratification and surveillance’ (1999) 6(3) *International Journal of the Legal Profession* 311-343; Sommerlad, H ‘Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid’ (2004) 31(3) *Journal of Law and Society* 345-68

<sup>29</sup>Leverick F and Duff P, ‘Court Culture and Adjournments in Criminal Cases: A Tale of Four Courts’ (2002) 39(Scotland) *Criminal Law Review* 39; 44

<sup>30</sup>Darbyshire P, *Sitting in Judgment: The Working Lives of Judges* (Oxford: Hart 2011); 154. Indeed, until the early 1950s, magistrates’ courts were known as courts of summary jurisdiction (McBarnet D, ‘Two Tiers of Justice’ in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994)).

<sup>31</sup>Sommerlad, H ‘The Implementation of quality initiatives and the New Public Management in the Legal aid sector in England and Wales: bureaucratisation, stratification and surveillance’ (1999) 6(3) *International Journal of the Legal Profession* 311-343; Cape, E ‘Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers’ *Legal Ethics* (2006) 9(1); 56-79

<sup>32</sup>Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

<sup>33</sup>Castellano U, ‘Beyond the Courtroom Workgroup: Caseworkers as the New Satellite of Social Control’ (2009) 31(4) *Law and Policy* 429.

<sup>34</sup>McConville M, Hodgson J, Bridges L and Pavlovic A, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994).

<sup>35</sup>*Ibid*; 210

<sup>36</sup>Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002)

### Neoliberalisation manifested through forms

Brenneis discusses how neoliberal governments' distrust of public services created a desire for efficiency to be both maximised and monitored through forms in public institutions. He asserts that the propagation of standardised forms occurred in the 1990s, which "was a period during which both new kinds of managerial models and, especially given the constrained resources and political climate, a new stress on accountability were quite evident."<sup>37</sup> It is via such mechanisms that bureaucracy (to which processes of document completion are integral) allows the state to exercise some control over the functions of publicly funded institutions.<sup>38</sup> Such bureaucratisation and standardisation has the effect of undermining individual rights in favour of speed.

All of the above is not, however, to say that defendants would necessarily prefer the proceedings to be conducted at a slower pace. Bottoms and McClean note that many defendants seek swift case conclusion for a number of reasons, including issues with employment, the trouble of attending court and the anxiety it causes.<sup>39</sup> There is therefore a balance to be struck between the swift conclusion of cases and enabling defendants to be included in the process while also protecting their rights.

Bourdieu noted that routinized practices are also important in encouraging stability within workgroups.<sup>40</sup> Thus standardisation becomes important to the habitus which provides actors with a sense of appropriate actions to take in particular circumstances. As such, the form may be a way of ensuring that policy initiatives (based on managerial principles) become integrated in the habitus, and the use of forms may be seen as one of the practices within neoliberal techniques of governance. There are, however, competing agendas to the working practices in the criminal justice system. The adversarial nature of the process – even when undermined by bureaucratic procedures - means that defence advocates and prosecutors assume different roles, which may explain why advocates raised concerns about the routinisation of proceedings (particularly case management) during the empirical research.

### Method

I sought, via empirical research,<sup>41</sup> to examine barriers to defendant participation in the summary criminal justice process. The objective of the research was to begin to illuminate the effect(s) of criminal justice policy on the behaviour of actors in magistrates' courts. My research took the form of a case study which "is concerned with the complexity and particular nature of the case in question"<sup>42</sup> and is

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<sup>37</sup> Brenneis D, 'Reforming Promise' in Riles, A (ed), *Documents. Artifacts of Modern Knowledge* (University of Michigan Press 2006); 60

<sup>38</sup> Murphy M, 'Bureaucracy and Its Limits: Accountability and Rationality in Higher Education' (2009) 30(6) *British Journal of Sociology of Education* 683; 689

<sup>39</sup> Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).

<sup>40</sup> Bourdieu P, *The Logic of Practice* (Stanford University Press 1990).

<sup>41</sup> The empirical research was conducted as part of my PhD study (Welsh, L. (2016) *Magistrates, Managerialism and Marginalisation: Neoliberalism and Access to Justice* (Unpublished PhD Thesis, University of Kent))

<sup>42</sup> Bryman A, *Social Research Methods* (Oxford University Press 2012) p66

generally associated with a specific organisation or community. The subject of the case study was a particular criminal justice area (as designated by the Ministry of Justice) in an area of South East England. As a result, the research takes an idiographic approach in which the findings cannot necessarily be applied regardless of time and place.<sup>43</sup> It should also be noted here that I had been a practitioner in the area of study at the time of conducting this research, which affected both the design of the study and collection of data.<sup>44</sup>

The empirical research consisted of observations followed by semi-structured interviews. The purpose of the observation and interviews was to become “immersed in a social setting for some time... with a view to gaining an appreciation of the culture of a social group”<sup>45</sup> from a greater distance than I had previously experienced. I conducted the equivalent of 20 days of observation in magistrates’ courts in South East England<sup>46</sup> between Autumn 2012 and Spring 2013. I observed a range of hearings including sentencing, bail applications, trials and case management hearings. I subsequently analysed the observation diary to identify themes and then drew out examples in support of those themes.

Observation of court processes can assist in uncovering the nature of relationships between court personnel and patterns of workgroup behaviour.<sup>47</sup> While Baldwin notes that courtroom observers may feel a sense of “exclusion, estrangement, and alienation”<sup>48</sup> from the proceedings (akin to defendants), my previous experience working in these courts allowed me to understand the nuances of court personnel behaviour. This research allowed me to reflect on my ordinary involvement in magistrates’ courts so that I could begin to reflect on the behaviour of lawyers and defendants in court. There was a risk that the participants may have altered their behaviour as a result of my presence. However, the fact that I was a partially participating observer<sup>49</sup> did, I think, minimise that risk. My experience was similar to Flood, who said:

“Being active in the field as participant can mean that others identify one as belonging to a particular group...My being so categorised meant that my situation was perceived as harmless and enabled me to observe things that I might not have been able to see if my position was different.”<sup>50</sup>

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<sup>43</sup> *Ibid*

<sup>44</sup> I practised as a defence solicitor for 10 years, and worked in the criminal justice system for 13 years up to 2015.

<sup>45</sup> Bryman A, *Social Research Methods* (Oxford University Press 2012) p369

<sup>46</sup> The particular criminal justice area incorporates four magistrates’ courts in an area of South East England.

<sup>47</sup> Baldwin J, 'Research on the Criminal Courts' in King, R and Wincup, E (eds), *Doing Research on Crime and Justice* (Oxford University Press 2000).

<sup>48</sup> *Ibid*, p245

<sup>49</sup> I take this definition of my role from Bryman, above at n42, in that I was (at that time) a participant in the groups’ core activities (i.e. I was a defence solicitor practising in the same courts I was observing) but I was not involved in the cases that I observed. The data obtained by interviews is as significant a data source as observation.

<sup>50</sup> Flood J, 'Socio-Legal Ethnography' in Banakar, R and Travers, M (ed), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) p43

Further, while the presence of an observer can result in reactive effects, several lawyers commented that they did not pay a lot of attention to what I was doing, and did not feel a need to be on their best behaviour, which they acknowledged they would have felt if a stranger had been present. I was, therefore, able to observe usual (as opposed to moderated) courtroom behaviour, as well as benefit from my own knowledge of the court system. I did have to be careful to remain reflexive about my role, and bias, to avoid the risk of over-identification with the research subjects. I do however argue elsewhere that some of my findings have been generated specifically as a result of my familiarity with the proceedings.<sup>51</sup> In addition, observations allowed me to focus the interviews on particular topics that required further exploration.

Given that I wanted to locate the findings in the context of policy change, I interviewed 19 advocates (12 defence lawyers and seven prosecutors) during Spring/Summer 2013. All interviewees had both long term experience of the system and an understanding of policy changes which had occurred. I decided to interview both prosecutors and defence solicitors to try and obtain as holistic a view as possible of the effects of policy change.

It will be apparent from the above that I had previously worked alongside all of the advocates that I interviewed.<sup>52</sup> While this meant that I had to be careful to remain reflexive about my role, it also brought several benefits. I was able to gain access to interview prosecutors with relative ease. I do not doubt that this was partly as a result of my familiarity with the courts I was examining; I was viewed as a familiar and trusted face – someone who was already a member of the workgroup and could consider the workgroup's interests. This meant that I was able to examine the issues from both sides of the adversarial system.

The interviews were separated into two sections, with one set of questions about funding and another about magistrates' court practices more generally. It was important that elements of the interviews were structured in order to obtain comparable data, but respondents were also encouraged to explain their opinions as they felt appropriate.<sup>53</sup> Interviewees were asked outright for their views on the use of forms in magistrates' courts. Interviewees were also asked about the effect of policies designed to improve efficiency and about lawyer/client relationships. I transcribed the interviews then thoroughly read and re-read the transcripts to identify themes and subthemes via "recurring motifs in the text"<sup>54</sup> which were

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<sup>51</sup> Welsh L, 'Are Magistrates' Courts really a 'Law Free Zone'? Participant Observation and Specialist Use of Language' (2013) (13) *Papers from the British Criminology Conference* 3

<sup>52</sup> I did not, however, interview my former colleagues within the firm that I had worked for because I felt that I was too familiar with the firm's procedures and client matters to be able to conduct an impartial interview. I also did not want to upset designated hierarchical patterns in my former office.

<sup>53</sup> This is similar to the approach adopted in Sommerlad (Sommerlad, H 'The Implementation of quality initiatives and the New Public Management in the Legal aid sector in England and Wales: bureaucratisation, stratification and surveillance' (1999) 6(3) *International Journal of the Legal Profession* 311-343)

<sup>54</sup> Bryman op. cit., n41, p554

then used to categorise and organise the data. While all interview data “can only be understood in the context of the interview”,<sup>55</sup> because it may only reflect an account of after the event rationalisations,<sup>56</sup> the fact that my data is relatable to similar studies does suggest that the propositions advanced have broader applicability across the summary criminal justice system. As such, it may be possible to tentatively suggest that these findings provide “an insight into the possible impact of the reforms”.<sup>57</sup>

### The data in relation to standardisation

Howard and Freilich are of the view that advocates, when dealing with large caseloads, increase efficiency via “a stale application of generalised procedures.”<sup>58</sup> I have taken generalised procedures to mean those that encourage particular routines, reduce discretion and are applied to cases regardless of the particular features of each case. Further, and of particular relevance to local context, familiarity and co-operation among a workgroup is also likely to lead to routinized practices.<sup>59</sup>

Advocates who were interviewed<sup>60</sup> expressed the opinion that, as an example of rigidity and in a desire to process cases expeditiously, too many issues are reduced to ‘yes’ or ‘no’ answers on standardised forms. For example, interviewee K said “everyone's got to fill in a form; everyone's got to tick a box to be audited and assessed to why you did that.”<sup>61</sup> The same interviewee went on to describe one policy designed to increase efficiency, *Criminal Justice: Simple, Speedy, Summary*,<sup>62</sup> (CJ: SSS) as faceless bureaucracy which removed personal discretion at all levels and was “unnecessary other than to sort of crank up the speed machine.”<sup>63</sup> Newman also notes that, by focusing on a need to be efficient and meet targets, clients are often offered standardised services.<sup>64</sup> One of his interviewees commented “There’s no time for access to justice...the client loses out in the need to get through the list”.<sup>65</sup> The standardisation that follows “entails that both action and speed are utilised to undermine individual identity.”<sup>66</sup>

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<sup>55</sup> Bano S, 'Standpoint', 'Difference' and Feminist Research' in Banakar, R. and Travers, M (ed), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) p103

<sup>56</sup> Sommerlad op. cit., n.9

<sup>57</sup> *Ibid* p317

<sup>58</sup> Howard, G and Freilich, J, 'Durkheim's Comparative Model and Criminal Justice Theory' in Duffee, D and Maguire, E (ed), *Criminal Justice Theory: Explaining the Nature and Behaviour of Criminal Justice* (Routledge 2007); 61

<sup>59</sup> Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203

<sup>60</sup> Interviews B, E, F, K and H

<sup>61</sup> Interview K; 3

<sup>62</sup> This initiative, specific to magistrates' courts, was introduced during 2006 and 2007 to try and combat perceived delay (Office for Criminal Justice Reform, *Delivering Simple Speedy Summary Justice. An Evaluation of Magistrates Court Tests* (2007)). The policy sought to reduce the workload of magistrates' courts by encouraging the use of out of court disposals, reducing the number of adjournments granted in cases that were pursued in court and conducting case progression hearings more quickly.

<sup>63</sup> Interview K; 8

<sup>64</sup> Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

<sup>65</sup> *Ibid*; 96

<sup>66</sup> Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 98



I suggest that the forms used in criminal proceedings are evidence of the desire for standard procedures that result from a hope to conduct cases as expeditiously as possible. For example, Interviewee O also expressed the view that "it's purely tick boxes at the moment...it's just so bureaucratic."<sup>67</sup> This provides an example of how speedy case progression dehumanises defendants, whose cases are all managed subject to the same procedures even though they are likely to involve different issues and defendants are likely to have different priorities.

At least 16 types<sup>68</sup> of form are now regularly referred to (either implicitly or explicitly) in magistrates' court in east Kent. Across 183 cases observed, there were a total of 220 references to forms, but only 49 of those references were explicit.<sup>69</sup> This demonstrates that forms operate to regulate the behaviour of the workgroup, without necessarily directly involving the person who is actually subject to the proceedings. My observations suggest that the most frequent explicit references to forms involve case management forms. Case management forms are used when a defendant pleads not guilty. The advocates are required to record the matters that are in dispute and evidential requirements and then fix a trial date accordingly.

While nearly all prosecutors interviewed<sup>70</sup> felt that case management is useful to focus the issues in the case, only three defence advocates<sup>71</sup> expressed a similar view. Defence advocates seemed to be more likely to express the view that case management removes discretion and becomes routine.<sup>72</sup> For example, interviewee K said

"I always taunted them that they often forget that there's a 'J' in there and what does that stand for and you know, they're so obsessed with this bureaucratic machine and moving it on...It [CJ: SSS] made the thing less case sensitive and it was very much a one size fits all mentality"<sup>73</sup>

These comments support Brenneis<sup>74</sup> view that the way that the forms are produced provides "frameworks for guided response,"<sup>75</sup> making it possible to detect a move towards standardised procedures. Demands for standardised procedures can be associated with the need to process cases quickly. As interviewee G noted "the system really is being forced through...for the sake of expediency

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<sup>67</sup> Interview O; 2-3

<sup>68</sup> Police bail notices, MG5 (police prepared case summary), MG10 (prosecution witness availability), Court bail notice, case management forms, sentencing reasons forms, trial reasons forms, means forms, cracked and ineffective trial forms, interpreter's timesheets, legal aid applications, form certifying committal procedures, TIC schedules, special measures applications, bad character and hearsay applications.

<sup>69</sup> I have taken implicit references to mean when it is clear that a form will be used but it is not actually referred to during proceedings.

<sup>70</sup> Interviews H, J, Q, L, M, N

<sup>71</sup> Interviews D, R, S

<sup>72</sup> Interviews B, E, F and K

<sup>73</sup> Interview K; 8

<sup>74</sup> Brenneis D, 'Reforming Promise' in Riles, A (ed), *Documents. Artefacts of Modern Knowledge* (University of Michigan Press 2006)

<sup>75</sup> *Ibid*; 49

as opposed to justice.”<sup>76</sup> Packer’s crime control model<sup>77</sup> associates volume processing with effective case disposal at whatever cost but it is possible to link increased reliance on, and reference to, forms with Bottoms and McClean’s liberal bureaucratic model,<sup>78</sup> which requires procedures that ensure justice is seen to be done - it is recorded on the form - but also requires volume processing so that the system does not become overburdened. Such practices result in standardisation, and, generally, “standardisation produces new legal regimes through routinisation of work and professional roles.”<sup>79</sup> One manifestation of the way in which new legal regimes are created via the use of forms is during the course of case management hearings, during which the parties attempt to identify the issues involved in cases that are listed for trial.

### Narrowing the legal issues

My observations suggested that lawyers tend to make implicit reference to particular points of law during the course of summary case management. Case management forms, therefore, also represent one way that law has come to be expressed in magistrates’ court proceedings. Case management hearings have evolved from Narey’s suggestion that pre-trial review hearings may alleviate the volume of ineffective trial listings that occurred in magistrates’ courts.<sup>80</sup> Subsequently, in his review of the criminal justice system, Auld expressed concern about the number of pre-trial reviews that occurred, and believed that the parties should take a more co-operative approach to case management.<sup>81</sup>

The forms used in case management have both administrative and legal roles in magistrates’ court processes. They require the parties to state the matters that are in dispute, the witness requirements (and reasons why witnesses are required), any further evidence to be served and any legal argument that is envisaged. As such, they require the parties to narrow the contested issues at trial so that court time can be used in the most efficient manner. The forms are also used to prevent the Crown being ‘ambushed’ at trial, which has the effect of focusing the Crown prosecutor’s time and resources only on those matters that are disputed.<sup>82</sup>

Case management forms are part of the executive’s desire to increase efficiency under the Cr.PR and therefore have an administrative function. Case management forms do also, however, have a role in potential legal argument about how evidential burdens are discharged and whether it would be just for trials to proceed. The form requires a defence advocate - the wording of the form assumes that the defendant has received advice - to indicate that a defendant has been advised that a trial can proceed in

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<sup>76</sup> Interview G; 2.

<sup>77</sup> Packer H, *The Limits of Criminal Sanction* (Oxford University Press 1968)

<sup>78</sup> Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976)

<sup>79</sup> Riles A, *Collateral Knowledge. Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011); 58

<sup>80</sup> Narey, M *Review of Delay in the Criminal Justice System* (Home Office, 1997)

<sup>81</sup> Auld, R. 'Review of the Criminal Courts of England and Wales: Executive Summary' (2001) <<http://www.criminal-courts-review.org.uk/auldconts.htm>> accessed on 05 October 2008.

<sup>82</sup> See comments made in *DPP –v- Chorley Justices and Andrew Forrest* [2006] EWHC 1795; *Malcolm-v- DPP* (2007) EWHC 363 (Admin)

his or her absence if the defendant fails to attend court as directed,<sup>83</sup> which is relevant to whether proceedings should continue in the absence of a defendant and whether a charge of failing to attend Court as directed can be laid.

Furthermore, the answers provided on case management forms about the issues in the case can be used as evidence during the course of a trial as implied admissions to particular elements constituting an offence, such as presence at the scene.<sup>84</sup> The majority of interviewees, particularly defence advocates, appeared to be acutely aware of the fact that what is recorded on the case management form could be referred to at subsequent hearings, and indicated that this led them to consider completion of the form very carefully. About half of defence advocates and half of prosecutors interviewed felt that legal knowledge is necessary to complete a case management form appropriately.

The completion of case management forms represents an important convergence of law and bureaucratic measures designed to ensure consistency and efficiency, and provides an example of standardisation as questions are reduced to a series of tick box answers with limited space to explain the issues.<sup>85</sup> There is a specific section of the case management form which asks whether the parties can agree a basis of plea or plea to an alternative charge. While the interview data indicated that both prosecutors and defence advocates view plea negotiations as useful, completion of the form becomes a way of demonstrating that the parties are acting in an efficient, co-operative manner, as well as a document which, in order to be completed appropriately, requires knowledge of both the nature of the charge and the evidential burdens which the Crown must satisfy to prove its case.

It was apparent that lawyers were conscious that the answers that they record on case management forms might be subject to be challenged by the court. For example, Interviewee O expressed annoyance that his assessment about the need for witness attendance at trial would likely be challenged by the court, which wanted the trial to conclude as swiftly as possible. He clearly regarded such challenges as an affront to his professionalism in stating “You’re a professional and you should be treated as one who is competent”<sup>86</sup> to make decisions about cases who are conducted. Interviewee E also commented that he would be expected to assimilate huge amounts of information very quickly in order to complete a case management form, about which his client could be cross-examined during the trial. The fee structure of publicly funded criminal defence work exacerbates these issues as lawyers are disincentivised from spending a significant degree of time examining the fine details of any given case. The implications of

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<sup>83</sup> See *R (on the application of Drinkwater) –v- Solihull Magistrates’ Court* [2012] EWHC 765 (Admin), *R –v- Jones* [2002] UKHL 5 for indications about when it would be appropriate to proceed in the absence of a defendant.

<sup>84</sup> This practice is discouraged following the judgement given in *R –v- Newell* [2012] EWCA Crim 650 but I have observed prosecutors putting the content of case management forms to defendants in cross examination.

<sup>85</sup> Examples of this include a yes/no answer as to whether the defendant has been advised about provisions which allow a reduction in sentence for entering an early guilty plea (incorporated in the Criminal Justice Act 2003)

<sup>86</sup> Interviewee O p12.

this are obvious – points may be missed meaning that relevant evidential or legal points may not be pursued, especially as responses are confined to generic answers recorded on case management forms. As such, lawyers are unable to unpack the layers of cases as the court tries to create closure by delimiting the contested issues during the course of case management. By inference, what is recorded on the form determines what types of issues are considered appropriate for litigation.

It seems therefore that the demand for efficiency builds singularity into the process. There is a desire for cases to be reduced to their singular features in order for trials to be litigated efficiently. It seems that Garland was correct to argue that “every aspect of criminal justice...performance indicators and management measures have narrowed professional discretion and tightly regulated working practice.”<sup>87</sup> By implication, these measures create further barriers to active defendant participation in the process.

### Conclusion

Magistrates’ courts have, for the latter half of the twentieth century at least, operated with voluminous caseloads. This has required techniques that encourage efficient case progression. This, along with the culture of workgroup co-operation, the specialised use of language, and technical decision-making operates to exclude defendants from effective participation in the proceedings.

The existence of *effective* defence representation is therefore crucial to ensure defendants’ rights are not undermined. However, the ability of defence solicitors to provide the best service may be compromised by, among other things, bureaucratic and professional pressures brought to bear by the use of standard forms. Such forms cannot be completed by defendants themselves as they do not have the technical knowledge required to do so, but their case may stand or fall upon their completion. Such procedures therefore create a barrier to defendant participation in the process, which may affect its sense of legitimacy.

Furthermore, demands for greater efficiency in summary criminal courts since the 1980s place greater emphasis on speed over just processes and encourage even greater degrees of co-operation in court. Both of these factors serve to promote the provision of routine and standardised services, which are manifested by the court’s requirement that trial procedures must adhere to those issues recorded on case management forms.

These factors significantly undermine the ability of defence lawyers to provide individualised services to defendants, which damages the rhetoric of justice. While Baldwin and McConville stated in 1977 that the injustices they saw essentially resulted from a system that “too often sacrifices the needs of the

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<sup>87</sup> Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 18

individual to the requirements of bureaucratic efficiency”,<sup>88</sup> I argue that the use of forms (as a manifestation of the government’s demand to increase efficiency) has exacerbated the problem by significant degrees.

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<sup>88</sup> Baldwin, J and McConville, M *Negotiated Justice* (Martin Robertson, 1977) p115